
No. 18-2486

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

IN RE DONALD J. TRUMP,
President of the United States of America,
in his official capacity,

Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the District of Maryland
(Peter J. Messitte, District Judge)

**BRIEF OF FORMER NATIONAL SECURITY OFFICIALS
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

Harold Hongju Koh
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
203-432-4932

Phillip Spector
MESSING & SPECTOR LLP
1200 Steuart St. #2112
Baltimore MD 21230
202-277-8173
ps@messingspector.com

Counsel for Amici Curiae

February 13, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

INTEREST OF AMICI CURIAE..... 6

ARGUMENT 7

 I. The Foreign Emoluments Clause protects U.S. national security
 and foreign policy interests by requiring Congress’ notice and approval
 of the President’s private business dealings with foreign governments..... 11

 II. Only a reading of the Foreign Emoluments Clause that encompasses
 private business dealings with foreign governments can adequately
 protect U.S. national security and foreign policy interests in the
 modern era. 20

CONCLUSION..... 27

APPENDIX: List of *Amici Curiae* 28

TABLE OF AUTHORITIES

CASES

| | |
|--|----|
| <i>Am. Ins. Ass’n. v. Garamendi</i> , 539 U.S. 396 (2003) | 16 |
| <i>United States v. Curtiss-Wright Exp. Corp.</i> , 299 U.S. 304 (1936)..... | 16 |
| <i>Zivotofsky ex rel. Zivotofsky v. Kerry</i> , 135 S. Ct. 2076 (2015)..... | 16 |

CONSTITUTIONAL PROVISIONS

| | |
|--------------------------------------|---|
| U.S. Const. art. I, § 9, cl. 8 | 7 |
|--------------------------------------|---|

STATUTES AND LEGISLATIVE MATERIALS

| | |
|-----------------------------|--------|
| 5 U.S.C. § 7342 (2012)..... | 18, 26 |
| 18 U.S.C. § 201 (2012)..... | 18 |
| 18 U.S.C. § 203 (2012)..... | 18 |
| 18 U.S.C. § 205 (2012)..... | 18 |
| 18 U.S.C. § 207 (2012)..... | 18 |
| 18 U.S.C. § 208 (2012)..... | 18 |
| 18 U.S.C. § 209 (2012)..... | 18 |
| 18 U.S.C. § 219 (2012)..... | 18 |
| 18 U.S.C. § 210 (2012)..... | 18 |
| 18 U.S.C. § 211 (2012)..... | 18 |
| 22 U.S.C. § 612..... | 18 |
| 37 U.S.C. § 908..... | 26 |

| | |
|--|--------|
| DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA (2d ed. 1805) (1788) | 12, 13 |
| RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) | 11, 12 |

EXECUTIVE MATERIALS

| | |
|--|----|
| 5 C.F.R. § 2635.502 (2017)..... | 18 |
| <i>Applicability of Foreign Emoluments Clause to Emp’t of Gov’t Emps. by Foreign Pub. Univs.</i> , 18 Op. O.L.C. 13 (1994)..... | 13 |
| <i>Application of Foreign Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Comm’n</i> , 10 Op. O.L.C. 96 (1986)..... | 13 |

| | |
|--|----|
| <i>Applicability of the Emoluments Clause to Non-Government Members of ACUS</i> , 17 Op. O.L.C. 6 (2010) | 14 |
| Brief for the United States as Amicus Curiae, <i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954) | 22 |
| <i>Committee on Foreign Investment in U.S.: Process Overview</i> , U.S. Dep’t of the Treasury (Dec. 1, 2010) | 18 |
| <i>FOCI FAQs</i> , U.S. Dep’t of Def. | 19 |
| <i>Gifts from Foreign Prince-Officer-Constitutional Prohibition</i> , 24 Op. Att’y Gen. 116 (1902) | 14 |
| <i>In re: Major Stephen M. Hartnett, USMC, Retired</i> , 65 Comp. Gen. 382 (1986)..... | 14 |
| Letter from Laurence H. Silberman, Acting Att’y Gen., to Howard W. Cannon, Chairman, Comm. on Rules and Admin., U.S. Senate (Sept. 20, 1974) | 19 |
| <i>Office of Overseas Prosecutorial Development Assistance and Training</i> , U.S. Dep’t of Just. | 21 |
| <i>To the Sec’y of the Air Force</i> , 49 Comp. Gen. 819 (1970)..... | 14 |
| <i>The U.S. Global Anticorruption Agenda</i> , The White House (Sept. 24, 2015) | 22 |
| <i>U.S. Anti-Corruption Efforts</i> , U.S. Dep’t of St..... | 21 |

OTHER AUTHORITIES

| | |
|---|----|
| <i>Annex to the Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service</i> , Org. for Econ. Cooperation and Dev. (2003) | 22 |
| BRUCE BUENO DE MESQUITA, <i>PRINCIPLES OF INTERNATIONAL POLITICS</i> (3d ed. 2010) | 24 |
| Clyde L. Grose, <i>Louis XIV’s Financial Relations with Charles II and the English Parliament</i> , 1 J. MOD. HIST. 177, 200-01 (1929)..... | 11 |
| <i>Conflicts of Interest and the Presidency</i> , CRS Legal Sidebar (Oct. 14, 2016)..... | 19 |
| Jack Maskell, Cong. Research Serv., R43365, <i>Financial Assets and Conflict of Interest Regulation in the Executive Branch</i> (2014)..... | 21 |
| Jonathan O’Connell and Mary Jordan, <i>For foreign diplomats, Trump hotel is place to be</i> , Washington Post, Nov. 18, 2016 | 24 |
| Lawrence Lessig, <i>REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT</i> (2011) | 11 |

| | |
|--|----|
| Letter from George Washington to Robert Howe (Aug. 17, 1779)..... | 11 |
| Mary Dudziak, <i>Desegregation as a Cold War Imperative</i> , 41 STAN. L. REV. 61 (1988)..... | 22 |
| Press Release, U.S. Dep’t of Justice, <i>State Department Employee Arrested and Charged With Concealing Extensive Contacts With Foreign Agents</i> (March 29, 2017)..... | 24 |
| St. George Tucker, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES (William Young Birch and Abraham Small, 1803) | 11 |
| The Association of the Bar of the City of New York, Special Committee on Congressional Ethics, James C. Kirby, Executive Director, Congress and the Public Trust (1970)..... | 21 |
| Theodoric Meyer and Matthew Nussbaum, <i>Trump Reports Assets of at Least \$1.4 Billion in Financial Disclosure</i> , Politico (June 16, 2017) | 20 |
| Thomas W. Milburn & Daniel J. Christie, <i>Rewarding in International Politics</i> , 10 POLITICAL PSYCHOLOGY 625 (Dec. 1989) | 24 |
| ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED (2014)..... | 12 |

INTEREST OF *AMICI CURIAE*¹

Amici curiae are former national security and foreign policy officials who have worked at the senior-most levels of the U.S. government for Presidents of both major political parties. Due to their decades of public service, amici are intimately familiar with the need for the Executive to act decisively, with one voice, on behalf of the nation. For the same reason, amici understand the critical importance of—and while in office sought scrupulously to obey—rigorous ethical rules to protect against undue influence in the national security and foreign policy making process.

Amici respectfully submit this brief pursuant to Fed. R. App. P. 29(a) to offer the Court their perspective on why such strict ethical standards are critical to the national security and foreign policy interests of the United States. The need for such standards supports reading the Foreign Emoluments Clause to encompass officials' private financial interactions with foreign governments. Only such a

¹ Amici affirm that no counsel for any party authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than amici, their members, and counsel, contributed money that was intended to fund preparing or submitting this brief. The views expressed by Yale Law School's legal clinics are not necessarily those of the Yale Law School. Counsel for amici sought the consent of both parties to this matter, and all parties consented to the filing of this brief. Counsel for Respondents consented to the brief, and counsel for Petitioners consented to a timely filed brief.

reading both squares with the Framers' intent and meets the practical national security and foreign policy necessities of today's interconnected world.

ARGUMENT

Amici take no position on the factual allegations of this case. However, Plaintiffs allege that the President has accepted something of value from a foreign government without either notification of or approval by Congress. If they can prove that claim, then under the correct reading of the Foreign Emoluments Clause, they have standing and have stated a claim upon which legal relief can be granted. Amici write to provide their views on the significant national security and foreign policy implications of this question, as well as to address an aspect of the district court opinion that is at odds with their official experience conducting national security and foreign policy.

The Foreign Emoluments Clause, U.S. Const. art. I, § 9, cl. 8, declares that

“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”

By so directing, the Framers were intent on preventing the undue influence of foreign governments in the United States' national security and foreign policy. The Foreign Emoluments Clause does not bar foreign payments *per se*. Instead, on its face, it defines a constitutional *process* to ensure that U.S. policymakers act

solely in the nation's interest by (1) requiring *notification* of and *approval* by Congress prior to (2) *acceptance* of value from a foreign government (3) by the President or other federal officials.

Defendant would substitute for this approach a much narrower rule that would give the President license to engage in a wide range of financial entanglements that would leave vulnerable the important national security and foreign policy interests of the United States. Their rule, at least as it was formulated below, was that the President may not receive certain gifts or compensation for services rendered in an official capacity or as an employee of a foreign government. But the Defendant's overly narrow reading would allow: (1) without any congressional oversight whatsoever, (2) acceptance of value from private business deals involving foreign governments or instrumentalities (3) by the President or other federal official in a manner that adds to their personal enrichment.

As a result, Defendant's reading would, for example, permit a nation that plays a central role in the balance of power in the Middle East, one of the world's most fraught regions for U.S. national security, to curry favor with the President by purchasing real estate from one of his companies. Defendant's reading would allow a rising power with whom the U.S. is engaged in a wide range of sensitive security and trade relations to pursue advantage by granting intellectual property benefits to the President's organization immediately upon his taking office. And

Defendant's reading would allow a nation with one of the largest economies in Latin America, a region with critical U.S. interests ranging from oil to trade to immigration, to approve a regulatory deal that personally enriches the President.

These are not hypothetical examples, but rather, specific allegations in the Plaintiffs' complaint involving Saudi Arabia, China and Argentina, respectively. As federal officials, we scrupulously avoided these sorts of private transactions with foreign governments, precisely because they would expose the U.S. to actual or perceived interference with U.S. national security and foreign policy. We also held the many government officials we supervised to the same standard. And, when we entered the Executive Branch with private financial holdings that could give rise to conflicts of interest, we: (1) fully disclosed those relations, including in the ethics and national security clearance process, (2) recused ourselves from participating in national security or foreign policy matters related to those interests, and (3) took steps to avoid even an appearance of impropriety, including the foreswearing of income, (4) all unless we obtained a waiver or approval from the appropriate official under the appropriate laws and regulations. All of these were legal requirements that, however cumbersome, we understood were necessary and appropriate to fully safeguard our country's national security interests.

Defendant's position would allow large streams of foreign government funds to the President to go undisclosed and unreviewed. This would create an unacceptable risk of undue influence through the entanglement of private funds

and public decisions, undermine U.S. anti-corruption and good governance efforts around the globe as a key tenet of U.S. national security and foreign policy, and inject confusion and fragmentation into our diplomatic relations by allowing foreign officials multiple opportunities for leverage in our national security and foreign policy. Our foreign policy decisions should be based on U.S. national interest, not private gain. The venues for those decisions should be embassies and foreign ministries, not corporate conference rooms. The mechanisms for those decisions should be diplomatic and security relationships, not private financial transactions.

The Framers of the U.S. Constitution wrote the Foreign Emoluments Clause precisely to empower Congress to protect these sound foreign policy practices. Appellees' reading would entirely invert the words of the Foreign Emoluments clause so that it would effectively read, "Person[s] holding any Office of ... Trust ... *shall*, without the Consent of the Congress, accept .. any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." This Court should resist Defendant's efforts to rewrite the Clause in this manner, while shielding himself from judicial review of his actions.

I. The Foreign Emoluments Clause protects U.S. national security and foreign policy interests by requiring Congress' notice and approval of the President's private business dealings with foreign governments.

The Founders believed, in the words of George Washington, that “[f]ew men have virtue to withstand the highest bidder.”² They were especially concerned that foreign nations would use financial or other means to interfere in our national security and foreign policy decisions. Elbridge Gerry, a delegate to the Constitutional Convention, emphasized, “Foreign powers will intermeddle in our affairs, and spare no expence [sic] to influence them.”³ Alexander Hamilton warned that “[f]oreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue.”⁴

² Letter from George Washington to Robert Howe (Aug. 17, 1779), <http://rotunda.upress.virginia.edu/founders/GEWN-03-22-02-0139>.

³ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 268 (Max Farrand ed., 1911).

⁴ 1 *id.* at 285. An elected president posed an even greater risk: Madison noted that a president, as opposed to a hereditary monarch, would lack “that permanent stake in the public interest which would place him out of the reach of foreign corruption.” 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 3, at 138. Even the British, however, were aware of the threat of external corruption: After dissolving Parliament, Charles II received payments from France, which raised concerns among some about Britain’s dependence on the French. *See* LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 19 (2011); *see also* ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES* (William Young Birch and Abraham Small, 1803) (“In the reign of Charles the second of England, that prince, and almost all his officers of state were either actual pensioners of the court France, or supposed to be under its influence The reign of that monarch has been . . . disgraceful to his memory.”); Clyde L. Grose, *Louis XIV’s Financial Relations with Charles II*

To guard against these very real dangers, the Framers of the U.S. Constitution developed the Foreign Emoluments Clause. Delegate Charles Pinckney introduced the Clause with the explanation that it was meant to “preserve foreign Ministers & other officers of the U.S. independent of external influence.”⁵ An influential early American edition of Blackstone’s Commentaries described the motivation behind the Foreign Emolument Clause as follows: “Corruption is too subtle a poison to be approached, without injury. Nothing can be more dangerous to any state, than influence from without, because it must be invariably bottomed upon corruption from within.”⁶

The leading historical incident that motivated the inclusion of the Foreign Emoluments Clause in the Constitution was the King of France’s presentation of a snuff box to Benjamin Franklin and other U.S. envoys.⁷ These gifts focused America’s attention on the need to place constitutional guardrails on the ability of

and the English Parliament, 1 J. MOD. HIST. 177, 200-01 (1929) (noting that Charles II received funds from France after dissolving Parliament).

⁵ 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 3, at 389.

⁶ ST. GEORGE TUCKER, *supra* note 4, at 295.

⁷ *See* 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 3, at 327 n.1 (citations omitted); *see also* DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 330-31 (2d ed. 1805) (1788) (recording Edmund Randolph’s referring to a snuff box as the motivation for the Foreign Emoluments Clause); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED (2014) 1-5, 23, 27 (2014) (discussing the French practice of giving snuff boxes to ambassadors and the concerns that generated).

foreign powers to transfer items of value in order to influence U.S. national security. Delegate Edmund Randolph would later explain, “if at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.”⁸ To address this concern, Randolph observed, “[i]t was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.”⁹

Consistent with this purpose, the Framers wrote a Foreign Emoluments Clause that is sweeping in its scope. The broad constitutional language that emerged prohibited the acceptance by those holding offices of trust of emoluments “of any kind whatever”. The Justice Department’s Office of Legal Counsel has interpreted the Clause to be “sweeping and unqualified”¹⁰ and “directed against every kind of influence by foreign governments upon officers of the United States.”¹¹ Or as the Comptroller General has explained, “it seems clear from the

⁸ ROBERTSON, *supra* note 7, at 330-31 (1788) (recording the statement of Randolph).

⁹ *Id.* at 330.

¹⁰ *Applicability of Foreign Emoluments Clause to Emp’t of Gov’t Emps. by Foreign Pub. Univs.*, 18 Op. O.L.C. 13, 17 (1994).

¹¹ *Application of Foreign Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Comm’n*, 10 Op. O.L.C. 96, 98 (1986) (quoting *Gifts from Foreign Prince-Officer-Constitutional Prohibition*, 24 Op. Att’y Gen. 116, 117 (1902)); see also *Application of Foreign Emoluments Clause to Part-Time*

wording of the constitutional provision that the drafters intended the prohibition to have the broadest possible scope and applicability.”¹²

Two aspects of the Clause—one substantive and the other procedural--deserve special emphasis. First, in their effort to protect the nation’s security, the Framers never drew the substantive line that Defendant would now draw between forbidden services rendered in an official or employee capacity versus permitted private business deals with a foreign government. A President’s public and private financial entanglements with a foreign government produce the very same problems, which the Founders identified two centuries ago: foreign governments will “spare no expense” to interfere in our national security and foreign policy

Consultant, 10 Op. O.L.C. at 98 (“Although no court has yet construed the Foreign Emoluments Clause, its expansive language and underlying purpose, as explained by Governor Randolph, strongly suggest that it be given broad scope.”); *Applicability of the Emoluments Clause to Non-Government Members of ACUS*, 17 Op. O.L.C. 114, 122 (2010) (explaining that the Foreign Emoluments Clause purpose reflects the view that “[t]hose who hold offices under the United States must give the government their uncompromised loyalty” and “[t]hat judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government”). In addition to quoting Randolph, many of the opinions also cite a 1902 opinion in which the Solicitor General wrote, “[i]t is evident from the brief comments on this provision, and the established practice in our diplomatic intercourse that [the Foreign Emoluments Clause’s] language has been viewed as particularly directed against every kind of influence by foreign governments upon officers of the United States, based on our historic policies as a nation.” *Gifts from Foreign Prince-Officer-Constitutional Prohibition*, 24 Op. Att’y Gen. at 117 (emphasis omitted) (citations omitted).

¹² *To the Sec’y of the Air Force*, 49 Comp. Gen. 819, 821 (1970); see also *In re: Major Stephen M. Hartnett, USMC, Retired*, 65 Comp. Gen. 382, 385-86 (1986) (“We . . . have concluded that this provision requires the broadest possible scope and application.”).

decision-making, our enemies will exert “external influence” on our foreign ministers and other officials, and our allies will find their “mutual friendship” with us “diminished” by even the appearance of impropriety. Defendant would have us believe that, to protect against undue interference in our national security, the Founders intended to prohibit a foreign nation from *giving* a snuff box to an ambassador, while leaving that foreign nation entirely free to *purchase* countless snuff boxes from that same ambassador (or the company he owns).

Second, the Founders defined a specific *constitutional process* to implement their purpose: when the President chooses to accept something of value from a foreign government, the Clause does not ban the transaction outright. Rather, it requires the *consent of the Congress*. By so doing, the Clause strikes a thoughtful constitutional compromise, enabling Congress to protect against potential presidential abuse in the national security realm, without unduly restricting the President’s ability to conduct national security affairs.

In amici’s prior roles, they have participated in countless urgent decisions in the national security, diplomatic, and intelligence spheres. Amici fully appreciate and acknowledge the need for the Executive to act expeditiously without congressional involvement to address urgent national security or foreign policy threats. But the President can claim no similar need to act without congressional involvement when it comes to the ethical implications of his own private commercial transactions. This is not an area where the Executive must “speak . . .

with one voice,” *Am. Ins. Ass’n. v. Garamendi*, 539 U.S. 396, 424 (2003) (citations omitted), or where “secrecy” by federal officials is necessary or desirable, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). Nor is it an area where the President can credibly claim that he possesses superior military or policy expertise, *id.* at 320, or that he is “better positioned to take . . . decisive, unequivocal action,” *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015).

Instead, this is a domain where the consultative process enshrined in the Foreign Emoluments Clause provides a critical, balanced check that should not be circumvented at the President’s convenience. It ensures that the Executive will exercise its national security and foreign policy authority solely for the nation’s good. It enables, and indeed, requires, that Congress and the American people evaluate whether foreign money would improperly influence national security decision-making. And it does so while ensuring that the President coordinates our national security and foreign policy—if Congress refuses to grant its consent to a transaction of value involving a foreign government, the President cannot accept the transaction, but he can continue to engage in policy-making. This constitutional process is made all the more important precisely because the President possesses such concentrated foreign policy powers. To remove the consent of Congress from all cases involving private financial transactions would upset the constitutional balance. It would grant the President broad national

security policy authority without the attendant congressional oversight required to ensure transparency and accountability in a sweeping category of financial deals involving foreign governments.

Since 1789, multiple Congresses have added layers to the Foreign Emolument Clause's constitutional foundation by developing a framework of conflict-of-interest laws and regulations to guard against the influence of foreign nations in our policy making. As a matter of substance, like the Foreign Emoluments Clause, this framework regulates both the private financial relationships and the official acts of U.S. officials who serve the public trust. As a matter of process, like the Foreign Emoluments Clause, these laws in many cases are premised on the same arrangement of *notification* and *approval*: they create processes to require transparency and bring potential conflicts of interest to light, while offering officials an opportunity to clear the conflicts to continue working on particular matters with a superior's approval.

Amici have all served in government under these laws. Amici have complied with the federal statute prohibiting executive branch officials from participating in matters that will affect their private financial interests (with a waiver and public disclosure in cases where the interest is deemed unlikely to

affect the integrity of their services).¹³ Amici have complied with regulations that require recusal where a financial interest would create even an appearance of bias (with a waiver available if amici inform the agency and receive authorization from an agency official).¹⁴ As public officials, amici complied with laws prohibiting officials from acting as agents of a foreign government.¹⁵ And now as former officials, amici have obeyed laws that restrict the capacity of former officials to represent or assist a foreign government in the year after leaving office¹⁶ and require citizens who otherwise serve as such agents to publicly register their clients with the U.S. government.¹⁷

Through these laws and others,¹⁸ Congresses over the years have affirmed what the Framers understood from the founding: our national security and foreign

¹³ 18 U.S.C. § 208 (2012). This provision is part of a larger anti-corruption segment of the United States Code. Surrounding sections criminalize giving public officials bribes, *id.* §§ 201, 210; taking bribes, *id.* §§ 203, 211; the pursuit of a claim by a current government employee when the government is an adverse party, *id.* § 205; and the involvement by ex-government employees in matters in which they had previously “participated personally and substantially,” *id.* § 207.

¹⁴ See 5 C.F.R. § 2635.502 (2017).

¹⁵ 18 U.S.C. § 219 (2012).

¹⁶ *Id.* § 207(f).

¹⁷ 22 U.S.C. § 612.

¹⁸ See, e.g., 5 U.S.C. § 7342; 18 U.S.C. § 209; *supra* note 13. There are also other examples of disclosure and approval statutory or regulatory schemes that are designed specifically to prevent foreign government influence in national security matters. In one regulatory regime overseen by the Department of the Treasury, companies contemplating mergers with or sales to foreign corporations in circumstances that could give rise to national security concerns must receive clearance from an inter-agency process. See *Committee on Foreign Investment in*

policy interests demand a balanced set of guardrails against conflicts of interests from overseas business entanglements with foreign governments. These critical constraints prevent undue influence, while allowing such interactions in particular cases where there is both disclosure and ex ante approval.

Significantly, the Department of Justice has previously taken the view that many of these statutory guardrails do not constitutionally apply to the President due to separation of powers concerns, arguing their impact is either to “disable him from performing some of the functions prescribed by the Constitution or to establish a qualification for his serving as President (to wit, elimination of financial conflicts) beyond those contained in the Constitution.”¹⁹ The Defendant now asks

U.S. [CFIUS]: Process Overview, U.S. Dep’t of the Treasury (Dec. 1, 2010), <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx> (providing an overview of the CFIUS process). Under another regime operated by the Department of Defense, a company under foreign ownership, control of influence may not receive a facility security clearance (and a company with such a clearance must report to the U.S. government that it is preparing to engage in a transaction with a foreign counterpart). *See FOCI FAQs*, U.S. Dep’t of Def., http://www.dss.mil/isp/foci/foci_faqs.html (providing an overview of the National Industrial Security Program process).

¹⁹ Letter from Laurence H. Silberman, Acting Att’y Gen., to Howard W. Cannon, Chairman, Comm. on Rules and Admin., U.S. Senate 4 (Sept. 20, 1974), <http://fas.org/irp/agency/doj/olc/092074.pdf> (discussing 18 U.S.C. § 208 (1970)); *see also Conflicts of Interest and the Presidency*, CRS Legal Sidebar (Oct. 14, 2016), <http://fas.org/sgp/crs/misc/conflicts.pdf> (“The Supreme Court has let stand a lower court decision recognizing the constitutionality of financial disclosures by elected officials under ethics laws. The Court also has generally upheld the constitutionality of campaign finance disclosure requirements as substantially related to the governmental interest of safeguarding the integrity of the electoral

the Court to take the additional step of reading private business transactions entirely out of the Foreign Emoluments Clause—a constitutional provision that embodies these same separation of powers concerns. For the Court to do so would create a significant legal vacuum that would expose our national security policy to the very foreign influences that the Founders and subsequent Congresses all tried to minimize.

II. Only a reading of the Foreign Emoluments Clause that encompasses private business dealings with foreign governments can adequately protect U.S. national security and foreign policy interests in the modern era.

To adopt the Defendant’s reading of the Foreign Emoluments Clause—excluding from its scope all private business arrangements involving foreign governments—would harm our national security and foreign policy in several respects. First, and most obvious, the United States is engaged in a range of highly sensitive interactions throughout the world in a fraught national security and foreign policy climate. As amici have observed, our adversaries and even our

process by promoting transparency and accountability. Imposing any more formal restrictions on the President may require a constitutional amendment, given the concern that statutory limitations such as disqualification could impede constitutional duties and raise separation of powers concerns.”). The President has submitted a financial disclosure under 5 U.S.C. app. § 101(d), (f)(1) (2012), but that disclosure does not identify for Congress or any other audience the financial dealings the President has with foreign governments. Theodoric Meyer and Matthew Nussbaum, *Trump Reports Assets of at Least \$1.4 Billion in Financial Disclosure*, Politico (June 16, 2017), <http://www.politico.com/story/2017/06/16/us-ethics-office-releases-trumps-financial-disclosure-239649>.

allies seek every advantage that is available on the international stage. A coherent national response to these threats requires our officials' undivided attention and commitment to serving the national interest. Allowing private business deals with foreign governments to go undisclosed, unapproved, and unmonitored creates substantial danger that national security or foreign policy decisions, "consciously or otherwise, will be motivated by something other than the public's interest."²⁰

Second, leaving private business transactions unreviewed creates an appearance of impropriety that undermines our global interests. Across administrations of both parties, the United States has fought against corruption around the globe as a core tenet of its foreign policy, on the grounds that it "saps economic growth, hinders development, destabilizes governments, undermines democracy, and provides openings for dangerous groups like criminals, traffickers, and terrorists."²¹ The United States has been a global leader in these efforts,

²⁰ Jack Maskell, Cong. Research Serv., R43365, Financial Assets and Conflict of Interest Regulation in the Executive Branch 1 (2014) (quoting The Association of the Bar of the City of New York, Special Committee on Congressional Ethics, James C. Kirby, Executive Director, Congress and the Public Trust, 38-39 (1970)).

²¹ *U.S. Anti-Corruption Efforts*, U.S. Dep't of St., <http://www.state.gov/anticorruption/> (accessed Nov. 1, 2017). USAID similarly funds anti-corruption efforts abroad, and the Justice Department's Office of Overseas Prosecutorial Development Assistance and Training works to promote anti-corruption abroad through the training of foreign prosecutors. *Office of Overseas Prosecutorial Development Assistance and Training*, U.S. Dep't of Just., <http://www.justice.gov/criminal-opdat>.

devoting roughly \$1 billion per year to anti-corruption and related programs.²² A central aspect of these global efforts involves ensuring that government officials do not entangle their official interests with their private business dealings.²³

Authorizing our own President to engage in precisely such entanglements corrodes this pillar of U.S. foreign policy, by conceding that our legal system will tolerate the very same self-dealing that we condemn whenever we see it abroad.²⁴

Third, allowing the President to engage in undisclosed, unapproved private business deals with foreign governments will confuse and fragment the channels by which foreign policy and national security policy is made. If a foreign nation is unsure whether U.S. foreign policy is based on a rigorous assessment of U.S. national security interests or the momentary financial interests of a single official,

²² *The U.S. Global Anticorruption Agenda*, The White House (Sept. 24, 2015), <http://obamawhitehouse.archives.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda>.

²³ See, e.g., *Annex to the Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service*, Org. for Econ. Co-operation and Dev. [OECD] 2 (2003), <http://www.oecd.org/governance/ethics/2957360.pdf> (“Governments are increasingly expected to ensure that public officials do not allow their private interests and affiliations to compromise official decision-making and public management.”).

²⁴ The potential for domestic affairs to undermine our stated foreign policy interests has, of course, previously affected judicial determinations involving purely domestic issues. See generally Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 65 (1988) (noting that “[a]ccording to the Department [of Justice], [*Brown v. Board of Education*] was important because ‘[t]he United States is trying to prove to the people of the world, of every nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by men’”) (quoting Brief for the United States as Amicus Curiae at 6, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

the foreign nation will begin to question the strength and durability of the U.S. commitment to that policy. If foreign nations do not like the answer they receive on a diplomatic track, those looking to secure favorable policy outcomes may choose instead to offer financial incentives or disincentives to a U.S. government decision-maker's private interests. Inevitably, these official and unauthorized tracks may include different officials with different interests and views, and may lead to different conversations and, potentially, different results. At the very least, this splintering of the channels of national security and foreign policy relations hamstrings our government's capacity to speak with one voice. Splintered channels of national security decision-making confuse the consistency and clarity of our messages to the American people and other countries, undermining the effectiveness of our policy decisions.

Finally, in amici's experience, foreign officials can be expected to use every available avenue, including private business relations, to attempt to curry favor with senior U.S. officials. A foundational concept of diplomatic practice is that nations will seek to use all available rewards or incentives to influence the behavior of other nations. While these inducements are usually aimed at the nations themselves, they can just as well be directed at particular officials, through such open and accepted means as offering tangible or intangible benefits to help a

favorable leader,²⁵ to such hidden and illicit means as bribes, influence peddling, and other misconduct.²⁶ The proposition that foreign nations have “the will and wherewithal” to seek advantage through available avenues for rewards and inducements is an accepted tenet of modern statecraft.²⁷

Indeed, foreign officials expressly have acknowledged that they would be motivated to stay in a hotel if owned or operated by a sitting President. One diplomat is reported to have said, “Why wouldn’t I stay at his hotel blocks from the White House, so I can tell the new president, I love your new hotel! Isn’t it rude to come to his city and say I am staying at your competitor?”²⁸ Another asserted, “Believe me, all the delegations will go there.”²⁹ And a former ambassador observed, “The temptation and the inclination will certainly be there.”³⁰ Amici believe this Court can take these officials at their word when they

²⁵ See, e.g., BRUCE BUENO DE MESQUITA, *PRINCIPLES OF INTERNATIONAL POLITICS* 240 (3d ed. 2010) (describing U.S. outreach to Boris Yeltsin on national security issues to lend him political credibility at home).

²⁶ See, e.g., Press Release, *U.S. Dep’t of Justice, State Department Employee Arrested and Charged With Concealing Extensive Contacts With Foreign Agents* (March 29, 2017) (describing arrest of State Department employee last year for concealing extensive contacts with Chinese officials who had lavished her with thousands of dollars in gifts).

²⁷ DE MESQUITA, *supra* note 26, at 240; see also *id.* at 37-42; Thomas W. Milburn & Daniel J. Christie, *Rewarding in International Politics*, 10 *POLITICAL PSYCHOLOGY* 625 (Dec. 1989).

²⁸ Jonathan O’Connell and Mary Jordan, *For foreign diplomats, Trump hotel is place to be*, *Washington Post*, Nov. 18, 2016 (internal quotation marks omitted).

²⁹ *Id.*

³⁰ *Id.*

suggest they would have incentives to enter into this business relationship not just because of the “service, quality, location, price and other factors,” but also because it could improve their relations with the President of the United States.

If anything, allowing the Foreign Emoluments Clause its full and rightful interpretation has become even more important today than it was at the founding.

The United States has never been more connected to—and its interests more interwoven with—the rest of the world. The modern, global economy has created countless new opportunities for foreign governments to employ private transactions to influence our economic well-being. The global nature of modern national security and foreign policy challenges, from terrorism to cyber threats to climate change, has caused the United States to deepen its engagement with the world through deep security, diplomatic, trade and other relations—yielding more opportunities than ever for sensitive national security and foreign policy interests to be compromised. At this global moment, the prophylactic function of the Clause has never been more urgent.

Defendant does not dispute that the Foreign Emoluments Clause was crafted to protect U.S. national security and foreign policy interests throughout the world. And yet, it is telling that Defendant has never actually addressed the national security or foreign policy consequences that would follow from his narrow interpretation of the Clause. Defendant instead argues that the narrow reading is needed because otherwise too many Presidential transactions would be barred. But

Congress can address this concern, as it has in the past, by exempting a transaction or even a category of transactions from the Clause *once the President discloses them to Congress*.³¹ In sum, the solution is not for Defendant to neglect or narrow the Constitution. Rather, it is for our nation to activate the constitutional checks and balances—here, disclosure and consent—that the Founders themselves expressly designed to protect the national security and foreign policy interests of the Republic.³²

³¹ See, e.g., 5 U.S.C. § 7342 (2012); 37 U.S.C. § 908 (2012). See also Def. Mem. 50.

³² At the very least, where, as here, the U.S. official is alleged to have engaged in knowing and indeed purposeful financial transactions involving foreign governments, the national security and foreign policy concerns are at their apex, because the risk of undue influence looms especially large.

CONCLUSION

For all of the foregoing reasons, Defendant's request for a writ of mandamus should be denied.

Respectfully submitted,

Harold Hongju Koh
RULE OF LAW CLINIC
Yale Law School
127 Wall Street
P.O. Box 208215
New Haven, CT 06520-8215
203-432-4932

/s/ Phillip Spector
Phillip Spector
MESSING & SPECTOR LLP
1200 Steuart St. #2112
Baltimore MD 21230
202-277-8173

Counsel for Amici Curiae

APPENDIX: List of *Amici Curiae*

1. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997. She has also been a member of the Central Intelligence Agency External Advisory Board since 2009 and of the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

2. Bruce Andrews served as Deputy Secretary of Commerce from 2014 to January 20, 2017.

3. Daniel Benjamin served as Ambassador-at-Large for Counterterrorism at the U.S. Department of State from 2009 to 2012.

4. Antony Blinken served as Deputy Secretary of State from 2015 to January 20, 2017. He previously served as Deputy National Security Advisor to the President of the United States from 2013 to 2015.

5. William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

6. Bathsheba N. Crocker served as Assistant Secretary of State for International Organization Affairs from 2014 to 2017.

7. Daniel Feldman served as U.S. Special Representative for Afghanistan and Pakistan from 2014 to 2015, Deputy U.S. Special Representative for Afghanistan and Pakistan from 2009 to 2014, and previously Director for Multilateral and Humanitarian Affairs at the National Security Council.

8. Jonathan Finer served as Chief of Staff to the Secretary of State from 2015 until January 20, 2017, and Director of the Policy Planning Staff at the U.S. Department of State from 2016 to January 20, 2017.

9. Joshua A. Geltzer served as Senior Director for Counterterrorism at the National Security Council from 2015 to 2017. Previously, he served as Deputy Legal Advisor to the National Security Council and as Counsel to the Assistant Attorney General for National Security at the Department of Justice.

10. Suzy George served as Deputy Assistant to the President and Chief of Staff and Executive Secretary to the National Security Council from 2014 to 2017.

11. Chuck Hagel served as Secretary of Defense from 2013 to 2015, and previously served as Co-Chair of the President's Intelligence Advisory Board. From 1997 to 2009, he served as U.S. Senator for Nebraska, and as a senior member of the Senate Foreign Relations and Intelligence Committees.

12. Heather A. Higginbottom served as Deputy Secretary of State for Management and Resources from 2013 to 2017.

13. John F. Kerry served as Secretary of State from 2013 to January 20, 2017.

14. Prem Kumar served as Senior Director for the Middle East and North Africa on the National Security Council staff of the White House from 2013 to 2015.

15. James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to January 20, 2017. He served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

16. Matt Olsen served as Director of the National Counterterrorism Center from 2011 to 2014.

17. Jeffrey Prescott served as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017, and as Deputy National Security Advisor to the Vice President from 2013 to 2015.

18. Eric P. Schwartz served as Assistant Secretary of State for Population, Refugees and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues on the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.

19. Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

20. Vikram Singh served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.

21. James B. Steinberg served as Deputy National Security Adviser from 1996 to 2000 and as Deputy Secretary of State from 2009 to 2011.

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e), 29(a)(5) and 32(a)(7)(B)) because this brief contains 5,385 words, excluding the items excluded by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Respectfully submitted,

/s/ Phillip Spector

Phillip Spector

MESSING & SPECTOR LLP

1200 Steuart Street #2112

Baltimore, MD 21230

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, Phillip Spector, hereby certify that on February 13, 2019, the foregoing document was filed and served through the CM/ECF system.

Respectfully submitted,

/s/ Phillip Spector

Phillip Spector

MESSING & SPECTOR LLP

1200 Steuart Street #2112

Baltimore, MD 21230

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-2486 Caption: In re Donald J. Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

Former National Security Officials
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☒ NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Phillip Spector

Date: February 13, 2019

Counsel for: Former National Security Officials

CERTIFICATE OF SERVICE

I certify that on February 13, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Phillip Spector
(signature)

February 13, 2019
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 18-2486 Caption: In re Donald J. Trump

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT
Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

Type-Volume Limit for Other Documents if Produced Using a Computer: Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch). Fed. R. App. P. 32(a)(5), 32(a)(6).

This brief or other document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

- ☒ this brief or other document contains 5,385 [state number of] words
- ☐ this brief uses monospaced type and contains _____ [state number of] lines

This brief or other document complies with the typeface and type style requirements because:

- ☒ this brief or other document has been prepared in a proportionally spaced typeface using Microsoft Word _____ [identify word processing program] in 14-point Times New Roman Font _____ [identify font size and type style]; **or**
- ☐ this brief or other document has been prepared in a monospaced typeface using _____ [identify word processing program] in _____ [identify font size and type style].

(s) /s/ Phillip Spector

Party Name Former National Security Officials

Dated: February 13, 2019